IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel. RUTH CAMPBELL, et al., Appellants, vs. COUNTY COMMISSION OF FRANKLIN COUNTY, and UNION ELECTRIC COMPANY, D/B/A AMEREN MISSOURI, Respondents.	)	No. SC94339

Appeal from the Circuit Court of Franklin County
The Honorable Robert D. Schollmeyer, Judge

SUBSITUTE BRIEF OF RESPONDENT UNION ELECTRIC COMPANY, DOING BUSINESS AS AMEREN MISSOURI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

Regulations

JURISDICTIONAL STATEMENT

Jurisdiction of this appeal is proper in this Court pursuant to Article V, Section 3, of the Missouri Constitution. This appeal is now moot, however, as set forth in Respondent's Motion to Dismiss Appeal as Moot, filed contemporaneously herewith.

STATEMENT OF FACTS

This case is before the Court on appeal from a certiorari proceeding in which Appellants challenged a zoning ordinance (the "Ordinance", a copy of which is included at Appendix pages A1-A18 for ease of reference) enacted by the County Commission (the "Commission") of Franklin County, Missouri (the "County"). The Franklin County Circuit Court issued a Writ of Certiorari directing the Commission to provide its legislative record in connection with the passage of the Ordinance but denied Appellants relief on the merits.

The Ordinance enacts a new section of the County's Unified Land Use Regulations (the "Zoning Regulations") regulating non-utility waste landfills and utility waste landfills ("UWLs"). It also sets up an application, plan review and permitting process for UWLs.

The Ordinance would allow Ameren to apply for a permit to construct a UWL in certain zoning districts within 1,000 feet of an existing power plant, if both the UWL and power plant are owned by a public utility. Ameren operates a coal-burning power plant in the County (the "Plant"), and intends to build a UWL next to the Plant.

A. Appellants' Certiorari Petition

Appellants' Petition was originally brought in six counts. Record at 14 (Volume 1) (hereafter, citations to the record will be formatted "R.14(1)"). Counts III through VI are not at issue in this appeal. Count I sought certiorari pursuant to § 64.870.2, RSMo, alleging that adoption of the Ordinance was illegal for failure to provide a fair public hearing. R.26(1). Count II also sought certiorari review, alleging that the Commission's decision did not promote the health, safety, and general welfare of the County. R.30(1).

Specifically, Appellants alleged:

1. They submitted comments at all of the hearings opposing the Ordinance. Petition, ¶12, R.18(1).

2. They submitted expert testimony and documents opposing the Ordinance. Petition, ¶13; R.19(1).

3. The County published notice of a public hearing on the Ordinance. Petition, ¶59; R.24(1).

4. The County Planning and Zoning Commission ("P&Z") held public hearings on the Ordinance on July 6 and July 20, 2010, and Appellants participated in these hearings and other proceedings before P&Z. Petition, ¶¶61 and 96; R.24(1) and R.30(1).

5. The County held a public hearing on the Ordinance on December 14, 2010, which was continued on February 8, 2011, and Appellants participated in this

hearing, both by testifying and through written submissions. Petition, ¶¶62, 90 and 96; R.24(1), R.29(1) and R.30(1).

6. On April 7, 2011, the County held a public session at which the Commissioners asked questions of nine of the persons who spoke at the public hearings, including witnesses who were offered by Appellants, and whom the Commission had invited to reappear for follow-up questioning. Petition, ¶¶63 and 90; R.25(1) and R.29(1).

7. Appellants submitted "information" to P&Z and the Commission purporting to demonstrate that the proposed Ordinance would threaten the health, safety and general welfare of the County. Petition, ¶97; R.30(1).

Appellants also alleged that they appeared personally and through consultant, attorney, and law-student witnesses at the hearings. R.18-30(1).

B. The Existing Plant

At the public hearings on the Ordinance, the Commission was shown aerial photographs of the existing Plant and surrounding land, including a proposed location for an ash landfill. *See, e.g.*, R.2091(12), R.2250(13). The Plant is surrounded completely by farmland located between the base of a 300-foot-high bluff and the Missouri River. R.2114-18(12); R.2122-30(12); R.3686(20); R.2252(13); and R.2352(13). Most power plants are sited on rivers for access to fresh water for operating the Plant and to facilitate transportation of coal into the Plant and ash out of the Plant. R.232(2); R.623-24(4); R.2070(12); R.1123(6).

The 1,000-acre Plant site included electrical power generation facilities and accessory uses, including coal delivery facilities, coal storage and inventory facilities, fly and bottom ash slurry settlement basins, ash reuse and reclamation facilities, and coal ash disposal ponds, all in use as part of the operation since 1970. R.2218(12), R.2377(13), R.3670(20), R.2067(12) *et seq*.

The Plant uses coal for fuel. R.3670(20); R.2216(12); R.2377(13). The Plant has always stored coal ash and generated approximately 500,000 tons of ash annually. R.3670(20).

Currently, coal ash that is not put to beneficial use (e.g., agriculture and concrete, R.1367(8); R.2087(12); R.2216(12)) is stored on site in settlement basins or ponds. R.229(2); R.2216(12). These ponds, in use since 1970, are nearing capacity. R.2216(12); R.2087(12). In addition, the existing ponds both discharge and leak water. R.327(2). For these reasons, replacement of the ponds with dry storage exceeding all local, state and federal standards (R.2052(12)) is the highest priority for Ameren and becomes more pressing each day.

The Plant is an integral part of the local and regional economy. R.1455(8). Approximately 300 people are directly employed at the Plant and roughly 1,600 jobs are indirectly generated by the Plant. R.629-30(4), R.1175(7). The Plant supplies roughly 40 percent of the electricity required for the metropolitan St. Louis area and has an estimated $260 million economic impact on the State of Missouri. R.629(4). The County receives roughly $2.5 million in annual property taxes for the Plant, while the State receives an additional $16.5 million. R.630(4).

C. Conduct of the County's Legislative Hearings on the Ordinance

The County filed its own formal application for the Ordinance in May of 2010. R.2082(12). P&Z also provided citizens the opportunity to comment on the landfill issue at numerous meetings, three of which were held on June 15, July 6 and July 20, 2010. R.2243(13); R.2082(12). At these meetings, P&Z "spent dozens and dozens of hours" reviewing the issues at hand in light of the feedback they received. R.662(4). A committee of P&Z met again on August 6, 2010. R.2082(12). P&Z considered the matter and voted on September 21, 2010, to recommend approval of the Ordinance, with numerous conditions. *Id*. P&Z submitted its recommendation to the Commission in October of 2010. *Id*.

On December 14, 2010, the first Commission hearing was held. R.829(5). The 48 speakers at this hearing consisted of various individuals from both the County and elsewhere, and attorneys for interested parties. *See, generally*, R. Vols. 2-7 (the "Transcripts"). The speakers were each given seven minutes to give testimony on the Ordinance. R.845(5). The December hearing began at 6:00 p.m. and ended at 11:27 p.m. R.3647(20); R.1242(7).

A continuation was scheduled for January 11, 2011. R.1253(7). Due to predictions of inclement weather, the Commission reset it for 6:00 p.m. on February 8, 2011. R.457(3). 52 individuals spoke at the continuation, which concluded at 10:57 p.m. R.825(5).

A final hearing took place from 10:00 a.m. to 3:44 p.m. on April 7, 2011. R.165(2). For this hearing, the Commission had asked certain speakers to return and

answer follow-up questions regarding their testimony from the Commission. R.173(2). Appellants' and Ameren's experts and consultants provided additional detail to statements and presentations made at the public prior hearings, and the Commission inquired as to landfill design, regulatory requirements, aesthetics, risk assessments, toxicity, beneficial uses of coal ash, and floodplain development. *See, generally*, R. Vols. 2-3 (April hearing transcript).

At the beginning of the first public hearing, the Presiding Commissioner stated (with statements about which Appellants complain printed in bold):

> And by the way, just so everybody understands, this really doesn't have anything to do with any fly ash or anything like that. This is strictly -- what we are here tonight is to hear comments and opinions and testimony on landfills, on utility waste landfills and landfills in general.
>
> So **if we start going off referring to Ameren and the proposal**, right **there is no proposal**. **There hasn't been anything filed yet, so that's going to be a totally separate issue.** All we are here tonight is to comment, positive or negative, on the proposed regulations about utility waste landfills and landfills to -- so that's what we are here -- that's what we are discussing tonight.
>
> I hope everybody adheres that. **If we go off on a tangent about Ameren or about fly ash and all that, I don't want to do that, but I will interrupt you** and say please stick to the issue itself, and that

> is the regulation that is before us for the Planning and Zoning Commission.

R.849(5) (emphasis added). Later during the first hearing, the Presiding Commissioner, addressing a speaker who mentioned "Ameren's proposal to build a huge coal ash landfill in the Labadie Bottoms", stated:

> If I could, again, we are strictly on the regulation. **We are not on any proposal that Ameren has submitted or things like that.**

R.1029(6) (emphasis added). Also during the first hearing, the County Counselor responded to a second speaker's mention of "truck traffic associated with construction of any proposed landfills" by stating:

> **There is no proposed landfill. That's the one thing we're trying to keep everyone from talking about.** . . . Coal ash is proper [. . . .] We're just not talking about truck traffic for a project that does not exist.

R.1051(6) (emphasis added). Thereafter, a third speaker in favor of the Ordinance was interrupted by requests from the Presiding Commissioner that comments be confined to the proposed Ordinance. R.1097-99(6). Lastly, a fourth speaker's reference to "a 400 more-or-less acre coal combustion waste landfill in the Labadie Bottom area" was met with requests from the Presiding Commissioner that comments be confined to the proposed Ordinance. R.1104-05(6). Thereafter, no additional requests regarding comments were issued by or on behalf of the Commission.

D. Evidence before the Commission

The Ordinance would not change the land uses in the area of the Plant, except to the extent that the farm fields next to the Plant would be converted to the power plant ash storage. Upon compliance with the new plan-approval and permitting process, the Ordinance would allow a UWL to be located on a portion of an adjoining 1,160-acre site to the east of the Plant (the "Site") as a permitted use. R.2187(12), R.2218(12). Although Ameren suggested a UWL zoning ordinance that would have permitted storage of ash from its other power plants outside of the County, the Commission rejected this concept and the Ordinance prohibited such inbound storage (and all storage-for-hire). R.143(1) (Appendix, A16).

Appellants did not claim or submit evidence to the Commission that the existing ponds at the Plant had enough storage capacity or that Ameren's stated need for a UWL was mistaken. R.2216(12).

The Commission received the County's zoning map showing an agricultural designation for the Plant and Site. R.1597(9); R.1599(9); R.1475(8). The County's Master Plan recommended the Site, next to the Plant and in the floodplain, for future agricultural or industrial use. R.1599(9). The County's Zoning Regulations also permit development in the floodway if the owner demonstrates the project will not cause a rise in the flood way or adversely impact the floodplain and obtains a development permit from the County floodplain administrator. *Id*.

Photographic renderings of a UWL next to the Plant indicated that a UWL at the Site would have negligible impact on surrounding views, due to its location at the bottom of a bluff. R.2123-30(12).

The Commission took testimony that no residential development had occurred, or would ever occur, in the area of the Plant and the surrounding land. R.2222(12). Aerial photographs and maps showed that the few structures nearest the center of the Site are nearly one mile away. R.2114(12). A circle drawn two miles around the center of the Site included few structures, as the area on top of the bluff looking down to the Missouri River is only very sparsely inhabited. R.2115(12); R.1476(8) *et seq*. Within a three-mile radius there is virtually no subdivision or commercial development. R.2116(12). The nearest development, St. Albans, is located approximately three miles to the east. R.2122(12). The Commission received statements of two real estate brokers and two property owners about lost sales, though they did not provide specific details (addresses, etc.). *See, e.g.*, R.1289-93(7); R.509-13(3), R.529-31(3), R.559(3).

Appellants did not indicate exactly where all of their respective homes or wells were on a map for the Commission. They did allege that one Appellant, Ruth Campbell, owned land "adjacent" to the Plant property, not the UWL Site, but that she resided elsewhere. R.1190-91(7). In any event, her holdings were separated from the Plant site by an operating railroad line. *Id*.

The County received into evidence a copy of the 1966 Order of the Missouri Public Service Commission ("PSC") approving the Plant, in which the PSC found:

> The Labadie site was chosen for the construction of the proposed plant because of the availability of an ample supply of water, the presence of a large level area upon which to construct the plant, and the ability to deliver large quantities of coal to it by either rail or barge. The latter factor would have a favorable effect on the ultimate cost of service to the consumer in that it would aid in the maintenance of a competitive position in the purchase of coal for its proposed plant.
>
> …
>
> [The PSC] is of the opinion and finds that the proposed construction, operation and maintenance of the multi-unit steam electric generating plant is in the public interest . . . .

R.2070-71(12).

Paul Reitz, a professional engineer experienced in designing UWLs, testified that current Missouri Department of Natural Resources ("MDNR") requirements are more environmentally protective and robust than design criteria applicable when the existing, unlined wet-storage ponds were put in use more than four decades ago. Mr. Reitz testified:

> . . . [M]ost of those [P&Z] recommendations are all addressed by existing guidelines that are in Missouri Department of Natural Resources' regulations for landfills.

> Those regulations, contrary to what was heard, have been in place since 1995. So Missouri is progressive as far having regulations for utility waste landfills.

R.1149-50(6). Mr. Reitz also submitted detailed drawings and photographs of typical UWL construction for the Commission's consideration. R.2106-09(12).

Opponents of the Ordinance offered documents attacking coal ash storage in unlined ponds, unlike the dry-storage landfill required by the Ordinance. *See, e.g.,* R.2239(13).

The Commission also received evidence that the United States Environmental Protection Agency ("EPA") contends that wet-storage damage cases support its decision to propose regulations which require dry storage of ash in landfills (similar to that required by MDNR and the Ordinance) going forward, rather than authorize the continued use of ponds. R.3966(21).

Dr. Lisa J.N. Bradley, a toxicology expert (R.1129(6); R.2054(12)), testified that a UWL of the type meeting the County's requirements under consideration would not create risk to public health or drinking water resources. She testified that:

1. Risk assessment requires evaluation of both toxicity and exposure. R.1130-31(6).

2. The level of toxicity is related to dose—some things may be toxic at high exposure levels, but non-toxic at low levels. For example, taking one aspirin is fine; taking an entire bottle at one time would be toxic. R.1131-33(6).

3. "[I]f there is no exposure, there is no risk." The general public will not have access to a UWL and its design and construction will mitigate the risk of exposure. R.1134(6).

4. The elements of coal ash about which Appellants expressed concern are naturally occurring and are present in soil, in the foods we eat, and even in daily supplements and vitamins. R.1135(6); R.2056(12). The constituents of coal ash complained of by Appellants, namely arsenic, cadmium, chromium, lead, mercury, and selenium, are not toxic in low concentrations. R.2056-57(12). They are found naturally in soil and water throughout the United States. *See* maps at R.2098-2102(12).

5. As part of its rulemaking process, EPA performed a risk assessment for the very type of landfill design required by the Ordinance. The assessment concluded that such design is protective and "that there are no risks above regulatory targets for the groundwater pathway". R.2054-55(12). In contrast to the assertion by Appellants that "[a]ll landfills leak" (R.1230(7)), the EPA's risk assessment used "published, measured performance data for commercial landfills as an input . . . . Thus, real world data on actual behavior of composite liners were used . . . [and] **the results indicate no potential risks to human health or the environment**, even when modeled for a 10,000-year period." R.2055(12) (emphasis in original).

6. Based upon studies performed following the failure of a wet ash pond at a Tennessee Valley Authority facility, inhalation of "fugitive dust" emissions from a

UWL (a) is not a problem, and (b) would be further minimized (or eliminated) by ash conditioning and dust suppression. R.2055(12).

7. As the Commissioners noted (R.379-81(3)), the so-called damage cases cited by Appellants and other opponents were inapposite because they involve unlined facilities. "No damage cases have been identified for landfills where engineering controls, as contemplated by this Ordinance, have been employed." R.2057-58(12).

8. The Commissioners sent a sample of the coal ash material out for testing, and the testing demonstrated that the coal ash at issue was not hazardous. R.2058(12); R.601(9); R.1261(7).

9. In assessing exposure risks based on an ingestion pathway, Dr. Bradley testified that, even if a house were built on top of a UWL "and a child was exposed to that coal ash every day by eating it, which we know is a situation that's not going to happen, that exposure dose to arsenic is what you are getting in your food every day." Dr. Bradley emphasized that there would in fact be "no exposure to the coal ash landfill." R.273(2).

10. In her letter to the Commissioners dated February 8, 2011, Dr. Bradley responded to and rebutted Appellants' other environmental claims about power plants and coal ash. R.2054-58(12).

Testing contracted by the County specifically concluded that all elements in the coal ash sample were below EPA regulatory levels. R.601(4); R.1261(7); R.2058(12).

This test was supported by other expert testimony and evidence received by the Commission (See R.2054-58(12); R.2090(12); R.261-291(2)).

The Commission received evidence that significant amounts of coal ash are recycled for beneficial uses. For years, the County placed coal bottom ash on roads to provide traction during storm events, purchasing such ash from the Plant. R.2089(12). Bottom ash was used in making concrete for Interstate 44, Highway 100, and Illinois levees (R.2089(12)), among other beneficial uses of coal ash, including wallboard and agricultural uses. R.2991(16); R.2056(12); R.2295(13); R.3675-76(20). A Quikrete plant, unprotected by any modern landfill design technology required by the Ordinance, sits adjacent to the Plant and converts coal fly ash and bottom ash into concrete used in home and commercial applications. R.303(2); R.2089(12); R.2216(12).

The Commission received evidence that MDNR comprehensively regulated the concerns raised at the public hearings, including site criteria, site investigation, construction specifications, including liners, wetland impacts, geology, hydrology, seismic stability, leachate collection systems, storm water management, groundwater monitoring, and fugitive air emissions. R.2188(12); R.2193-2214(12). The Commission received copies of lengthy and detailed MDNR regulations, as well as evidence of the statutes enabling them, Chapter 260, RSMo. R.2153(12) *et seq*.

The Commission also received evidence of siting, design and permitting jurisdiction of the U.S. EPA and Army Corps of Engineers over hazardous waste disposal and wetlands, respectively. R.213(2); R.245(2); R.619(4); R.1143-53(6).

The Ordinance imposes new UWL requirements not imposed by the state, and zoning expert Richard Ward testified that it was unusual for a local jurisdiction to enact any environmental regulations within a zoning ordinance, particularly where such concerns were "more properly within the purview of other state and federal regulatory agencies." R.2221-38(12).

The Commission took evidence that, as part of the state landfill siting and permitting process, an applicant is required to obtain MDNR approval of a comprehensive "Detailed Site Investigation" ("DSI"). 10 C.S.R. 80-2.010 *et seq*.; R.2164-74(12). The DSI is defined by the state regulations: "The process of conducting a detail surface and subsurface geologic and hydrologic investigation for a proposed solid waste disposal area." 10 C.S.R. 80-2.010(22); R.2165(12). The Commission was told that the State must approve or reject the DSI within 60 days of submittal by the utility, and that Appellants and any other citizens have the opportunity to comment upon, and potentially to challenge, any permitting decision made by MDNR with respect to a UWL.

Outside of the public hearings on the Amendment, Appellants gave the Commission a copy of Appellants' counsel's lengthy and detailed written critique, including multiple engineering exhibits, of Ameren's DSI, which Appellants had also filed with MDNR. R.2254-78(13). This document is included at Appendix pages A19-A43 for ease of reference.

Appellants submitted another letter outside the last public hearing, (R.3691-93(20)), in which they referred the Commission to a website at which the Commission could review the Ameren DSI. R.3691-93(20).

The Commission received copies of the MDNR regulations that contemplate construction of UWLs in floodplains:

> Owners-operators of proposed utility waste landfills, located in one hundred (100)-year floodplains shall demonstrate to the department that the utility waste landfill will not restrict the flow of the one hundred (100)-year flood, reduce the temporary water storage capacity of the floodplain, or result in washout or waste as to pose a hazard to public health or the environment.

10 C.S.R. 80-11.010(4)(B)(1) Site Selection. R.2194(12). Similarly, EPA's proposed draft regulations do not prohibit the construction of a UWL in a floodplain. 40 C.F.R. Parts 257, 261, 264, 265, 268, 271 and 302 (Proposed EPA rules) at R.3961-4098(21-22).

The Commission also took evidence of the state zoning enabling statute that prohibited the County from enacting zoning regulations that authorize interference with public utility services that have been authorized or ordered by the PSC. R.2152(12) (*citing* § 64.890.2(3), RSMo).

The only zoning expert who appeared and testified at the public hearings was Richard C. Ward, who testified orally and submitted a written report. R.2223-38(12). Mr. Ward stated that the utility waste use was by definition public and that the public aspect of the use is quite relevant in land use planning, because the public welfare of the Plant, including the necessary ash storage, affected the public welfare of all the residents of Franklin County. R.2219(12). Mr. Ward stated that the current Plant uses and the storage of ash could not and should not be removed from the County without an actual

detriment to the public welfare. He also testified that the Plant provided a substantial economic benefit to the County in property taxes and employment. *Id*. Mr. Ward believed it was significant that environmental regulations of power plants, including ash storage, were already intensively enforced by the federal government, MDNR, and the Missouri PSC.

He opined that there were several ways in which the current County land use ordinance could prudently permit construction of a UWL next to the 40 plus-year-old Plant. These methods included a finding that a dry ash landfill would be an "accessory use" to the Plant, given that it would serve the same function of replacing or supplementing the existing ash storage ponds, treatment and recycling facilities now on the Plant site. R.2220(12); R.609-621(4). Mr. Ward concluded that a utility power generation plant could also be established as a permitted use in the agricultural district. R.2220(12).

Mr. Ward stated:

> While it is possible that [ash waste] could be disposed off-site, presumably in an as yet undetermined and further remote location from the St. Louis urban area, this would require its movement by truck over roads through the main street of Labadie, across Franklin County and perhaps beyond. The economic and community impacts of this option would be significantly greater than properly retaining the surplus waste material on-site.

R.2221(12).

Mr. Ward noted that there was virtually no suburban development near the plant in the 42 years since it was constructed, and the St. Albans high-end residential community and golf course a couple of miles north and east of the Plant had been developed successfully "with the operating power plant in clear view." *Id*. Mr. Ward stated the proposed ordinance minimized the impact on other land uses and the current and proposed County Master Plans did not recommend residential or commercial development in the area surrounding the Plant. *Id*.

The Commission took evidence that the new dry storage of coal ash planned by Ameren involves transportation of ash from the adjacent plant as a wet slurry which hardens within days after placement in the UWL. R.2216(12). It is conditioned with water as it is deposited to minimize dust. R.229(2); R.2107-08(12).

E. The Circuit Court's Ruling

Appellants filed their Verified Petition for Writ of Certiorari against the County on November 23, 2011. The Circuit Court issued a Writ of Certiorari on the same day and the County produced a proposed record (the "Writ Record") on January 17, 2012. R.55(1). On January 20, 2012, the Circuit Court granted a Motion to Intervene filed by Ameren. R.69(1).

Appellants did not seek appointment of a referee to take additional evidence in the Circuit Court. On April 18, 2012, Ameren and the County filed a Motion for Appointment of a Referee to take evidence on certain claims made by Appellants in the Petition. R.7(1). Appellants opposed this Motion. R.9(1). Appellants also opposed the use of discovery to test their wells and claims of concern of contamination. R.8-9(1).

On May 21, 2012, the Circuit Court granted Respondents' Motion for Judgment on the Pleadings or to Dismiss Counts I, III, IV, V, and VI of the Petition. R.91(1).

On August 1, 2012, and August 2, 2012, Appellants and Ameren filed objections to the Record as produced by the County. On August 24, 2012, the Circuit Court granted Appellants' objections to the record without objection by Ameren, thereby adding certain materials to the Writ Record, some of which were submitted directly to County officials by Appellants and other opponents after the close of the public hearings. R.10(1).

On January 11, 2013, the Circuit Court entered a judgment as to Count II. R.4709(25). The court found that Plaintiffs participated in the public hearings and other proceedings before P&Z and the Commission regarding the Ordinance and submitted evidence against the Ordinance both to P&Z and the Commission. *Id*. The court issued findings of fact and conclusions of law, holding that the legislative findings of the Commission were supported: "The Record supports the legislative decision approving the Zoning Amendment, and the Commission could have reasonably found that the plaintiffs and other opponents did not effectively rebut or refute the fundamental facts in support of the Zoning Amendment listed in this Court's findings above and elsewhere in the Record." R.4713(25).

SUMMARY OF ARGUMENT

A. Point I Summary

The judgment of the Circuit Court should be affirmed. Appellants' argument misdirects the Court as to the nature of Appellants' Petition for Writ of Certiorari.

This is not a personal injury case, or a declaratory judgment, or any other type of action initiated in the Circuit Court to determine facts. This is a review, by writ of certiorari, of a county legislative proceeding as authorized by § 64.870.

The directive in the statute that this review process be by writ of certiorari distinguishes it from other legal proceedings. *See Gash v. Lafayette Cnty.*, 245 S.W.3d 229 (Mo. banc 2008). In a certiorari case, the trial court is a court of appeal, and it rules based upon a record established at the legislative or administrative body below (in this case Franklin County). *See State ex rel. Modern Fin. Co. v. Bledsoe*, 426 S.W.2d 737, 740 (Mo. App. 1968).

The standard of review in a certiorari case is well established:

> On review of a denial of a conditional use permit by a municipal agency, an appellate court reviews the ruling of the municipal agency, not that of the circuit court. The standard of review is whether the agency's action is supported by competent and substantial evidence upon the record. In determining whether the administrative action is supported by substantial and competent evidence upon the whole record, an appellate court may consider only the record that was before the administrative body.

Platte Woods United Methodist Church v. City of Platte Woods, 935 S.W.2d 735, 738 (Mo. App. W.D. 1996) (citations omitted). The *Platte* court reviewed an administrative zoning decision, rather than a legislative decision as in the present case, but the holding limiting appellate review to the decision and record of the underlying body, not the circuit court on certiorari, applies to any certiorari case, by definition.

Appellants' request for review of the Circuit Court's grant of Respondents' Motion for Judgment on the Pleadings or to Dismiss as to Count I under the "well pleaded petition" standard is contrary to the settled law governing certiorari appeals. Review of the Circuit Court's action pursuant to such standard is only proper when the Circuit Court refuses to issue the writ, at all, and no record is ordered from the lower tribunal. *See Modern Fin. Co.*, 426 S.W.2d at 740. In that event, without a record, review is solely for whether the petition stated facts sufficient to warrant review, as in any other civil action prior to the creation of a record. That did not happen here. The Circuit Court issued the Writ and thereafter received volumes of the Commission's legislative record—before ruling on Count I. It is the Commission's legislative record and actions that this Court reviews.

It is telling that, in their Point I procedural unfairness claim, Appellants want review of their Petition only, rather than the Commission's legislative record as a whole (which they caused to be brought before the trial court by their requested writ of certiorari). The Record overwhelmingly establishes that Appellants were not prejudiced by the statements of the Commission about which they complain.

It is also telling that, although § 64.870.2, allows the Circuit Court to "appoint a referee to take additional evidence in the case" and Appellants had the opportunity to submit whatever evidence they claim was rejected by the Commission, Appellants declined to request a referee to compensate for the alleged unfair hearing limitation.

Ameren does not contest Appellants' right under their First Point Relied On to seek review of the conduct of the legislative hearing by the County Commissioners (absent the mootness of this case, however, as set forth in Respondent's Motion to Dismiss this appeal). Ameren merely requests review on the County legislative record as a whole, and not merely on the bare allegations of Appellants' Petition, which are refuted by the record.

B. Point II Summary

Appellants' Point II should be denied. Missouri case law and the doctrine of separation of powers dictate that the deferential "fairly debatable" standard of review applies to the Court's review of this legislative decision. If the Commission's decision is fairly debatable, the legislative conclusion is determinative. Even if the less deferential "substantial and competent evidence" standard of review were applied, as Appellants incorrectly request, the Court would not weigh the evidence, but would simply confirm the presence of substantial and competent evidence supporting the legislative conclusion.

Regardless, the Commission's decision should be upheld because the evidence in the record supporting that decision was overwhelming, not simply substantial and competent, making the Commission's decision eminently fair. Containing the unavoidable by-product of coal power (ash) in one area, adjacent to the sole user and

using a drastically superior storage method while mitigating risk of exposure is good land use policy. Indeed, both P&Z and the Commission favored the approach, reacting logically to the evidence before them. Such evidence included the following:

1. The Plant, an integral part of the local and regional economy and certified by the PSC to be in the public interest, requires coal ash storage to operate and is running short on available storage in settlement basins. Pursuant to the Ordinance, state-of-the-art dry coal ash storage could be implemented to replace outdated and leaking settlement basins in use at the Plant.

2. Coal ash storage according to the requirements of the Ordinance protects public health and safety by (a) replacing the outdated ponds mentioned above, (b) mitigating any risk of human exposure with multiple, redundant protections, and (c) preventing transportation of coal ash on County roads. Moreover, independent testing conducted at the Commission's request found coal ash to be non-hazardous.

3. The Site is ideal for a UWL: isolated from other development and residences, adjacent to a major coal-fired power plant, and unlikely to impact property values, which should already account for the existing power plant.

4. Legitimate zoning concerns (such as traffic, noise, and consistency with master land use planning) were not implicated by competent evidence. To the contrary, the Ordinance enables a use of the Site that is consistent with the County's Zoning Regulations and Master Plan.

5. Had the County not enacted the Ordinance, a UWL would have been permissible as an accessory use, leaving the County without any applicable regulations. Enacting the Ordinance ensured that the County could exercise what limited control is available to it regarding UWLs.

ARGUMENT

I. THIS COURT'S REVIEW OF THE COMMISSION'S LEGISLATIVE PROCEDURE DISREGARDS THE CIRCUIT COURT MOTION RULING AND DIRECTLY EXAMINES THE COMMISSION'S LEGISLATIVE RECORD, THE CONTENT AND VOLUME OF WHICH REFUTE APPELLANTS' UNFAIR HEARING ARGUMENT (APPELLANTS' POINT I)

Appellants' First Point Relied On misleadingly frames the issue as an error in granting a dispositive motion (Respondents' Motion for Judgment on the Pleadings, or, in the Alternative, to Dismiss), and denial of a right to trial "on the merits"—as if Appellants were deprived of their day in court. This point should be denied, and in fact contradicts Appellants' own steadfast avoidance of a referee to take additional evidence at the circuit court level.

This is a certiorari action. Appellants caused the Circuit Court to have the full County legislative record before it, and Appellants fully briefed and argued the merits of Ameren's motion for judgment on the pleadings or in the alternative to dismiss Count I. Appellants should not now be heard to argue for reversal on the basis of their bare allegations, ignoring the voluminous record before the Circuit Court.

In their First Point Relied On, Appellants claim that "the Circuit Court Erred in Dismissing Count I…." Appellants' Brief, p.24. Appellants go on to argue that "[b]ecause the Circuit Court dismissed Count I on the pleadings without providing Labadie Neighbors an opportunity to demonstrate on the merits that the 'hearing' in this case was invalid, this Court should remand Count I for resolution on the merits by the Circuit Court." Appellants' Brief, p.34-5. *See also* Appellants' Brief at p.31: "These factual allegations, which are taken as true for purposes of the motion to dismiss…."

Finally, Appellants state:

> …it is well-settled that appellate courts **do not reach the merits** when reviewing a circuit court's dismissal for failure to state a claim.

Appellants' Brief, p.35 (emphasis added). All of these arguments are misleading. Appellants had their hearing—before the Commission.

Not surprisingly, Appellants cite no certiorari cases (in which the circuit court acts as an *appellate court*) for these propositions. The final appellate court—this Court—will in fact "reach the merits" of Appellants' Count I when it "reviews the decision of the County Commission [and] not that of the Circuit Court." *See* Appellants' Brief, p.43.

The record and the actual allegations of Appellants' own pleading show that the Commission conducted a full and fair hearing.

A. Standard of review.

At the outset, it is essential to understand the nature of Appellants' certiorari case. This is not a personal injury case, a declaratory judgment, or any other type of lawsuit

initiated in the circuit court to determine facts and rule on issues of law. This is a review of a county legislative proceeding by statutory writ of certiorari, an appellate proceeding even at the circuit court level.

Section 64.870.2, provides:

> Any owners…aggrieved by any decision…of the county commission…may present to the circuit court…a petition…stating that the decision is illegal in whole or part…and asking for relief therefrom. Upon presentation of the petition the court shall allow a writ of certiorari directed to the…county commission…of the action taken and data and records acted upon and may appoint a referee to take additional evidence in the case. The court may reverse or affirm or may modify the decision brought up for review. After entry of judgment in the circuit court in the action in review, any party to the cause may prosecute an appeal to the appellate court having jurisdiction in the same manner now or hereafter provided by law for appeals from other judgments of the circuit court in civil cases.

The designation of the statute that this review process is by writ of certiorari distinguishes it from other, more common, types of legal proceedings. *Gash, supra*.

Modern Fin. Co., supra, defined the certiorari appeal process as follows:

> The common-law writ of certiorari embodies a command by a court addressed to an inferior tribunal. It directs that the record of a

> proceeding in the latter be forwarded to the issuing court. The function of the writ is to bring that record before the issuing court for the purpose of determining whether the inferior tribunal acted outside its jurisdiction or otherwise illegally, in situations where no appeal or other available mode of review is afforded.

Id. at 740.

While this is an unusual proceeding in Missouri courts, and is even rarer in review of legislative zoning decisions (*see Gash, supra*, at 233), the scope of review on appeal has been well established in administrative local zoning decisions under § 89.110, RSMo, which has identical review language. *See Platte, supra*; *see also State ex rel. Sander v. Bd. of Adjustment of the City of Creve Coeur,* 60 S.W.3d 14, 15 (Mo. App. 2001) ("We review the Board's findings and conclusions, instead of those issued by the circuit court.").

In addition, in a writ of certiorari proceeding "the petition is not to be viewed as a pleading," and it therefore should not be reviewed under typical pleading standards. *State ex rel. Halpin v. Powers,* 68 Mo. 320, 1878 WL 9334 at *2 (Mo. 1878).

Once the circuit court issued the Writ, the reviewing court must look only to the record of the Commission to determine whether the petitioner is entitled to the relief sought. *Modern Fin. Co., supra*; *Platte*, *supra*. At that point, the appellate court treats the petitioner's pleading only as one "for remedy" under the statute. *Platte*, 935 S.W.3d at 738.

Appellants' "well pleaded" petition standard is only applied when the court refuses to issue a writ at all. *See Modern Fin. Co.*, 426 S.W.2d at 750. In that case, no record was ever ordered from the lower tribunal, and, without that record, review was limited to whether the petition stated facts sufficient to warrant review, as in any other traditional civil case prior to the creation of a record. Here, the circuit court issued the Writ and received over 4500 pages of record from the Commission.

Conspicuously, Appellants want this Court to limit its review to their Petition, rather than examining the legislative record. This is because the legislative record, and Appellants' own brief, make it clear that Appellants were not prejudiced by the Commission's statements at the beginning of one of the hearings.

The standard of review for a hearing misconduct claim is either "significant" (83 Am. Jur. 2d Sec. 511) or "substantial" (*Nat'l Labor Relations Bd. v. Monsanto Chem. Co.*, 205 F.2d 763 (8th Cir. 1953)) prejudice.

Appellants cannot satisfy either standard of review and thus, are seeking to improperly limit the Court's review to their Petition.

In Missouri Attorney General Opinion 256, December 21, 1965, the standard for a local legislative hearing was described as follows:

> The County Court must make a reasonable effort to hear arguments and evidence, pro and con on the adoption of the…ordinance. The County Court in its discretion, exercised in a reasonable manner, may control and limit such presentation.

As noted, § 64.870.2, allows the Circuit Court to "appoint a referee to take additional evidence in the case." Appellants had the opportunity to submit whatever evidence they claim was rejected by the Commission. However, they refused to request such an opportunity and opposed Ameren's attempt to do so.

B. Appellants' procedural unfairness argument is refuted by the record.

Appellants ask the Court to ignore the record. As Appellants state, in an appeal in a certiorari case, the Court reviews the decision of the Commission, not the decision of the Circuit Court. Appellants' Brief, p.43.

At the heart of their Point I is Appellants' unsupported allegation that the Commission "prevented," "prohibited," or "precluded" witnesses from testifying about the Ameren project and the Site. *See, e.g.*, Appellants' Brief, pp.12, 14. The enormous legislative record shows that, of the 100 speakers at the public hearings, four were interrupted by requests to stay on topic. One such interruption concluded with the Presiding Commissioner overruling an objection by the County's own attorney and directing that that the witness should "go ahead and finish." R.1039(6). The witness proceeded to testify and submit written materials (R.2344(13)) relating specifically to the Ameren Site, without further interruption.

No witness was interrupted after page 138 (R.1104(6)) of the first of three hearing transcripts, which total 537 numbered pages. After being interrupted, that speaker also proceeded to testify and submit written materials (R.4198(23) and R.4228(23)) relating specifically to the Site, and without further interruption. All of the non-lay witnesses put forward by Appellants (at least four) testified without interruption, making detailed

statements about the Site. R.561(3) *et seq*.; R.1225(7) *et seq*.; R.1059(6) *et seq*.; R.1069(6) *et seq*.

Following the Commissioner's comments quoted by Appellants, at least 64 speakers testified about Ameren or the Site. *See, generally*, R. Vols. 2-7 (transcripts), and *e.g.*: R.905(5), 911(5), 913(5), 919-20(5), 923(5), 937(5), 951(5), 953(5), 955(5). The term "Ameren" appears at least 1,600 times in the legislative record, including 159 references in the hearing transcripts. This number does not include the myriad references to the "site" or the "Labadie Plant," which did not use the word "Ameren." The term "fly ash," also the basis of Appellants' claim of legislative error by the Presiding Commissioner, appears 49 times in the public testimony alone, after the allegedly offending comment.

The Presiding Commissioner made no mention of any concern about speaking about "Ameren" or "fly ash" at either the February 8, 2011, public hearing or the April 7, 2011, special meeting.

In addition, Appellants have emphasized that most of the legislative record is not even public testimony at the hearings, but mountains of paper submitted to the Commission:

> The evidence in the Record is more appropriately presented in terms of the substantive issues relevant to Count II rather than witness testimony. The hearing transcripts comprise less than one-fourth of the Record;* most of the Record consists of written comments, reports, and other documents submitted to or by the County.

* Hearing transcripts constitute approximately 1,081 out of 4,580 pages in the Record.

Appellants' Brief before the Missouri Court of Appeals, p.14. For example, Appellants submitted into the legislative record a 25-page, single-spaced letter that their attorney had written to MDNR, discussing the Site and environmental claims in extensive detail. R.2254-78(13) *et seq*. (Appendix, A19-A43). The letter speaks for itself as to Appellants' intimidation claim, but notably included detailed maps and other attachments specifically opposing the Ameren UWL in this specific location.

Yet Appellants now argue that at the public hearings, unknown members of the public were intimidated from offering unknown evidence that was qualitatively different from the arguments made by the other witnesses. This level of "intimidation" not only did not stop 96 other live witnesses, but would have had to scare off others from even mailing in written opposition after the hearings.

Nevertheless, Appellants have claimed that the Commission "prevented", "prohibited" and "precluded" witnesses from testifying about the Ameren project and Site. Appellants' argument is belied by the legislative record, which includes every comment and objection that Appellants, including a presumably unlimited number of law-student "witnesses," who may or may not have been citizens of the County, could think to offer. They do not suggest what additional evidence, objection, or commentary anyone could have added or was precluded from adding.

Specifically, the record is full of uninterrupted statements of the kind that Appellants allege were not permitted. *See, e.g.,* R.1071(6), R.2377(13) (presentation by

Professor Robert Criss at December 14, 2010, public hearing, focused exclusively on the Site, received by the Commission without interruption).

This is a very small sample:

> [. . .] should Ameren be permitted to proceed with its plans to develop a landfill to store coal ash waste on its property near the Labadie Power Plant if done in accordance with federal and state and county regulations?

R.925(5).

> There is great concern in Labadie that should Ameren be permitted to proceed with their plans for a 400-acre coal ash dump next to their Labadie plant, this quaint historic town of the Lewis and Clark Trail may no longer be consider [sic] suitable for the Great Streets Program.

R.975-6(6).

> We all know we're here because Ameren wants to put a coal ash landfill next to its Labadie Plant in Labadie Bottoms.

R.1209(7).

> Ameren then applied for preliminary site approval, which was reflected in publicly available documents from the Department of Natural Resources. In November 2010, Ameren publicized the availability of its draft detail [*sic*] site investigation. It also hosted a public information session regarding the draft detail [sic] site

> investigation. It posted copies of the report on its website, and then made copies available at the Union Service Center Library and at Washington Public Library.

R.687-9(4).

> On screen is a map that shows our drinking water well is where it's located in relation to the site that the owners of this plan want to put a coal ash landfill.

R.747(4).

> The Sierra Club supports the rights of the people of Franklin County to protect themselves and the people downstream in St. Louis County and St. Louis City by refusing to allow Ameren Missouri to dump coal ash in the Missouri River floodplain. We ask that this Commission not allow a coal ash landfill to be created in the Missouri River floodplain.

R.537(3).

C. Appellants' arguments were refuted by their own pleading, at any rate.

Even if this Court were to decide the issue on the pleadings alone, Appellants' Petition demonstrated (as confirmed by Appellants' arguments under Point II) that their "unfair hearing" claim was baseless. The Petition admitted away the alleged claim.

In their Petition (R.14-54(1)), Appellants alleged that they submitted comments to the Commission against the adoption of the Ordinance (*Id*. at ¶ 12), submitted expert testimony and documents to the Commission against the adoption of the Ordinance (*Id*. at

¶ 13), the County published a notice of a public hearing on the Ordinance (*Id*. at ¶ 59), P&Z held public hearings on the Ordinance on July 6 and July 20, 2010, and Plaintiffs participated in those hearings and proceedings (*Id*. at ¶¶ 61, 96), the Commission held a public hearing on the proposed Ordinance on December 14, 2010 and February 8, 2011, and they participated in that as well. *Id*. (¶¶ 62, 90, 96).

Appellants alleged that on April 7, 2011, the Commission held a public session at which the Commissioners asked questions of nine of the persons who spoke at the public hearings, and whom the Commission invited to reappear, (*Id*. at ¶¶ 63, 90), and that P&Z and the Commission held hearings on the proposed Ordinance, which hearings were on proposals requiring that a coal ash landfill in the County be located within 1,000 feet of a utility power generation plant, and under common ownership with the adjacent power plant. *Id*. (¶ 76).

Appellants alleged that they submitted information to P&Z and the Commission purporting to demonstrate that the proposed Ordinance would threaten the health, safety and general welfare of the County. *Id*. (¶ 97).

Appellants' pleaded conclusion that there was no hearing was contrary to Appellants' own allegations, in addition to being refuted by the copious record.

D. Appellants have not shown prejudice.

It is elementary that an appellate court will not reverse any judgment "unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action." Rule 84.13(b). The certiorari record and Appellants'

allegations show no prejudice as a result of the handful of statements made by or on behalf of Commissioners.

Appellants did not allege in Count I, nor do they cite now, any relevant evidence or testimony that was kept from the County legislators. They do not and cannot cite even one page of submitted testimony or documentation that was rejected. They do not and cannot name even one person who was prevented from addressing the Commission. They do not allege that Ordinance supporters were treated differently from opponents.

Instead, they seem to imply that some person who heard a statement of the Presiding Commissioner might have been "chilled" from speaking. Speculation does not establish prejudice. This is especially true where § 64.870 allows the record to be supplemented before the Circuit Court. Appellants' conscious decision not to try to support their speculation with evidence shows that there was no prejudice.

E. Appellants are effectively asking the Court to adopt a new Missouri cause of action that would require the judiciary to analyze the statements of local elected officials and to create procedural rules for conduct of local legislative hearings.

Appellants admit that there is no legal authority supporting their First Point Relied on. Appellants' Brief, p.31.

There is a reason that there is no legal authority. Judicial review of statements by legislators would violate the separation of powers between the judiciary and legislatures (both local and state). The only cases in which Missouri Courts have invalidated local zoning procedures are cases in which there was both (1) untimely or defective (in

content) notice in objective violation of a statute or ordinance, and (2) lack of actual notice to the plaintiff. Neither situation is present here. No cases inject the judiciary into local parliamentary procedure or scrutiny of words used by local elected officials.

The purpose of the notice and public hearing requirements is to afford interested persons an opportunity to be heard regarding a proposed zoning ordinance. *Bonds v. City of Webster Groves,* 432 S.W.2d 777 (Mo. App. 1968). As *Bonds* makes clear, a party has no right to complain of even a complete failure to provide the required notice of a hearing if the party has actual knowledge of the hearing and appears at the hearing:

> In this case, Mrs. Bonds not only had actual knowledge that the hearing would be held, but was actually at the meeting representing her interest and that of her husband. Furthermore she actually was heard. She voiced no objection to the failure to give notice at said meeting or at the meetings thereafter of the City Council which she and plaintiffs' attorney attended. Under these circumstances, plaintiffs are in no position now to complain of the failure of defendant to give said notice.

Id. at 783-784. As in *Bonds*, Appellants, having appeared *en masse* in opposition to the Ordinance, cannot complain of unfairness.

Even it is accepted that the Presiding Commissioner's statements were literally incorrect or inappropriate (they were not), such statements (a) were never enforced, and (b) were harmless. As noted, the volume of evidence actually received and considered (even immediately following requests to stay on topic) was immense. No one is entitled

to a *perfect* hearing: "We know of no rule of law that requires a judgment or administrative decision automatically to be set aside because of the receipt or preclusion of a single piece of evidence in violation of the requirements of due process. Even in criminal cases, the law inquires into whether the taint resulting from the improper admission was harmful in light of the record as a whole." *Crabtree Realty Co. v. Planning and Zoning Comm'n of the Town of Westport*, 845 A.2d 447 (Conn. App. 2004). The same rule applies to administrative hearings and zoning cases. *Id.*

The Missouri legislature has not, in the zoning enabling statutes or otherwise, directed local elected officials to conduct public hearings in any particular way, or for any particular length. The legislature has imposed rules requiring recusal of legislators for such reasons as a pecuniary interest in the pending matter. *See, e.g.,* § 105.452, RSMo (prohibiting acts in conflict of interest). Neither the legislature nor the courts of Missouri have seen fit to do what Appellants advocate in this case -- that is, to dictate rules for the democratic process.

F. Appellants' cited authority is not on point.

Appellants rely on two cases from other jurisdictions, neither of which is on point.

In *Yost v. Fulton County,* 348 S.E.2d 638 (Ga. 1986), the court found fault with a hearing at which opponents of rezoning "never had the opportunity to speak out in opposition to the rezoning." *Id*. at 639. Similarly, in *Kurren v. City of New Kensington,* 208 A.2d 853 (Pa. 1965), the "sole question" was "whether the notice given by the city complied with the applicable law." *Id*. at 854. Because the notice given by the city council failed to inform the public that a hearing would be held at which the members of

the public could express their views, pro and con, on the proposed zoning legislation, "the resulting legislation must fall." *Id*. at 856.

Unlike *Kurren*, the Commission lawfully notified the public of the hearings and allowed those present to speak, going so far as to continue hearings and hold more hearings than legally required to accommodate speakers. Nine of the Appellants either spoke or submitted comments prior to the Commission's vote. Moreover, the *Kurren* court acknowledges that such hearings should be limited to the actual proposed zoning legislation, which was precisely what the Commission attempted to do. This promotes efficiency and avoids speculation regarding related or unrelated matters.

Appellants did not plead and do not now claim lack of timely notice, inaccurate notice, unreasonably short time limits for speakers, an insufficient number of meetings, or unequal treatment. Appellants cite no provisions of the state zoning enabling statutes (Chapter 64, RSMo) and no case law supporting their theory that a statement by a legislator conducting a public hearing in an auditorium full of speakers could invalidate the entire marathon process.

The Court may analogize to the requirements for an administrative hearing, which are more formal than the legislative hearing at issue in this case. No particular form of procedure is required, and the cardinal test is the presence or absence of rudiments of fair play. Fair play dictates that the hearing be conducted in an orderly manner, and that the body provides a reasonable opportunity for proponents and/or opponents to be heard. However, the body has the power and discretion to limit such presentation. *See* Attorney General Opinion No. 256, *supra*.

II. THE COMMISSION'S LEGISLATIVE DECISION WAS FAIRLY DEBATABLE AND ALSO SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE, AND THEREFORE MUST STAND (APPELLANTS' POINT II)

Appellants' Point II should be denied. In reviewing a legislative decision, this Court has made it clear that it "does not in any sense, substitute its discretion or judgment . . . for that of the legislative body of the city and that it does not review the legislative discretion; its consideration of reasonableness is confined to a determination of whether there exists a sufficient showing of reasonableness to make that question, at the least, a fairly debatable one; if there is such, then ***the discretion of the legislative body is conclusive***." *Binger v. City of Independence,* 588 S.W.2d 481, 483 (Mo. banc 1979) (for consistent analysis in another state, *see Carter v. Adams*, 928 S.W.2d 39 (Tenn. App. 1996)). "The so called 'debatable' rule merely means that if there is substantial evidence both ways the legislative conclusion is determinative." *City of Olivette v. Graeler,* 369 S.W.2d 85, 96 (Mo. 1963)(*overruled on other grounds by City of Town and Country v. St. Louis Cnty.*, 657 S.W.2d 598, 600 (Mo. banc 1983)).

The policy decision of the Commission should be affirmed. The evidence before the Commission showed that the legislation was at least fairly debatable. Even if the Court were to apply Appellants' requested and inapposite "substantial evidence" scope of judicial review, the decision of the Commission was amply supported. Any uncertainty about the reasonableness of a zoning regulation must be resolved in the government's favor. *Lennette Realty & Inv. Co. v. City of Chesterfield,* 35 S.W.3d 399, 405 (Mo. App. 2000).

Even under Appellants' "substantial and competent evidence" scope of review (applying only to administrative local decisions), this Court would not weigh Appellants' opposition evidence against the evidence for the Ordinance, but would simply confirm that there is substantial and competent evidence to support the decision. Even in reviewing an administrative action for substantial evidence under the less deferential standard of review, the substantiality of contrary evidence is immaterial. *Greene Cnty. Concerned Citizens v. Bd. of Zoning Adjustment of Greene Cnty.,* 873 S.W.2d 246, 262 (Mo. App. 1994).

A. The "fairly debatable" standard of review applies.

Zoning ordinances are legislative decisions. *Gash, supra,* at 233. A court may reverse a legislative decision only if it is arbitrary and unreasonable, meaning that the decision is not "fairly debatable," and zoning amendments, which are policy decisions by elected officials, are subject to this deferential standard of judicial review. *Summit Ridge Dev. Co. v. City of Independence*, 821 S.W.2d 516, 519 (Mo. App. 1991).

The County's legislative decision is presumed to be valid. *Vatterott v. City of Florissant*, 462 S.W.2d 711, 713 (Mo. 1971). Although a city's police power is not unlimited, it is very broad. *St. Charles Cnty. v. St. Charles Sign & Elec., Inc.*, 237 S.W.3d 272, 275 (Mo. App. 2007). "The party challenging the ordinance must negate every potential basis that might support it." *Id.* "If reasonable minds might differ as to whether a particular ordinance has a substantial relationship to the protection of the general health, safety, or welfare of the public, then the issue must be decided in favor of the ordinance." *Id.*; *see also City of Creve Coeur v. Nottebrok*, 356 S.W.3d 252, 258

(Mo. App. 2011)(*overruled on other grounds by Edwards v. City of Ellisville*, 426 S.W.3d 644, 659 (Mo. App. 2013)).

Judicial deference to legislative decisions such as zoning amendments is based upon the doctrine of separation of powers, a constitutional doctrine, which may not be overturned by the judiciary (or by statute of the legislature). Mo. Const. Art. II; *Lennette*, 35 S.W.3d at 408; *E. Missouri Coal. of Police, Fraternal Order of Police, Lodge 15 v. City of University City*, 386 S.W.3d 755, 763 (Mo. banc 2012).

Appellants are mistaken in arguing that § 64.870.2, RSMo, providing for review of certain county legislative decisions by writ of certiorari, "eliminates the distinction between legislative versus quasi-judicial zoning decisions." *Gash* overrules prior case law providing that the *remedy* for review of legislative zoning decisions in certain counties could be by declaratory judgment, holding that, by literal reading of § 64.870.2, the sole remedy is by a writ of certiorari. *Gash* does not change the *scope of judicial review* or the requirement of a high level of deference to political decisions. The statute itself does not purport to change the standard of review, and the level of deference, as noted, is a matter of separation of powers.

State ex rel. Kolb v. Cnty. Court of St. Charles Cnty., 683 S.W.2d 318, 321 (Mo. App. 1984), a legislative zoning ordinance case cited extensively by Appellants in the Circuit Court, applies the "fairly debatable" scope of review:

> The reviewing tribunal must first determine whether the property owner's evidence has overcome the presumption of the reasonableness of the present zoning and if so, it must then consider

the defendants' evidence and determine if continuance of the present zoning is a fairly debatable issue.

The *Kolb* court deferred to the county's legislative zoning decision. *Id.* at 321-22. *Gash* does not cite *Kolb* or overrule it with respect to the highly deferential scope of judicial review of legislative decisions.

Appellants cite *State ex rel. Cooper v. Cowan*, 307 S.W.2d 676, 678-79 (Mo. App. 1957), as a legislative zoning decision applying the substantial evidence scope of review, but *Cooper* characterized the decision at issue repeatedly as an *administrative* decision, and even expressly relied on Chapter 536, RSMo, the Administrative Review Act. The local zoning body in *Cooper* was acting as a County Court—an administrative and ministerial body. In the present case, the Commission was not acting as a County Court, but rather as a legislative body.

Appellants' reliance on *State ex rel. Remy v. Alexander*, 77 S.W.3d 628 (Mo. App. 2002), is similarly misplaced. In *Remy*, the Court reviewed the decision of a board of adjustment, which is an administrative, not a legislative, body. *Id.* at 629.

In their brief before this Court, Appellants restate the environmental policy arguments that they made to the elected legislative officials, but do not attempt to establish why the zoning policy decision of the County was not fairly debatable. Appellants do not attempt to show that the supporting evidence was not substantial and competent. Their repeated references to their "concerns" and "fears" and "possible risks" are not evidence.

B. The Ordinance is at least fairly debatable.

The evidence supporting the Commission's legislative decision to enact the Ordinance makes that decision far more than fairly debatable. Even if all of Appellants' claims were considered, the body of evidence supporting the Ordinance was far more than substantial. It was overwhelming.

1. The Ordinance is necessary.

It is undisputed that the Plant is running out of space to store coal ash. Appellants submitted no evidence that the public utility does not need more storage for its coal ash. R.2216(12).

Any UWL will serve the public welfare of the citizens of Franklin County (and beyond). What the PSC found in 1966 about the Plant area remained true as of the hearings:

> [The] is of the opinion and finds that the proposed construction, operation and maintenance of the multi-unit steam electric generating plant ***is in the public interest*** …."

R.2070-71(12) (emphasis added). The County was dealing with a public utility, operating a regional power plant in a location found by the PSC to be "in the public interest." R.2071(12). The Ordinance by definition furthers the public welfare.

Appellants do not define the public welfare. Neighboring property owners are not the "public," and their collective interests are not the "public interest" that must be weighed in any rezoning inquiry. *Rhein v. City of Frontenac*, 809 S.W.2d 107, 111 (Mo.

App. 1991) (citing *Huttig v. City of Richmond Heights,* 372 S.W.2d 833 (Mo. 1963); *see also Hoffman v. City of Town & Country*, 831 S.W.2d 223 (Mo. App. 1992). In *Huttig, Rhein* and *Hoffman*, the court overturned each city's refusal to rezone residential property to commercial, where the refusal was based upon residential neighborhood opposition.

This tenet is especially compelling in the case of a regional public utility. *See also,* Respondent's Motion to Dismiss Appeal as Moot. A legislative zoning decision based on a desire to help or refrain from affecting a few property owners is not substantially related to the public interest and may not be justified on that basis. *Despotis v. City of Sunset Hills*, 619 S.W.2d 814, 822 (Mo. App. 1981); *Loomstein v. St. Louis Cnty.,* 609 S.W.2d 443, 450 (Mo. App. 1980).

Ironically, despite the volume of opposition to the Ordinance, measured by headcount, there were in fact no homes or other residential land uses anywhere near the Plant or UWL site. The area is almost wholly uninhabited. R.2114-18(12).

Even if there were a "neighborhood" nearby, the Commission's decision is entitled to great deference. In *Heidrich v. City of Lee's Summit,* 916 S.W.2d 242, 248-49 (Mo. App. 1996), for example, the court partially affirmed a city's grant of a rezoning for a planned business district over opposition by neighbors. In doing so, the Court applied the fairly debatable standard, stated that the legislative action was presumed to be valid, and applied the rule that "any uncertainty about the reasonableness of a zoning regulation must be resolved in the government's favor." (*quoting State ex rel. Barber & Sons Tobacco Co.,* 869 S.W.2d 113, 117 (Mo. App. 1993).

The Ordinance would allow the Plant to upgrade to a state-of-the-art storage facility. It is odd that Appellants, including an environmental organization, have argued against the improvement of technology from wet ponds. Appellants illogically told the Commission that, because one of the aging open ponds at the Plant had leaked (R.1037(6); R.513(3); R.541(3); R.571(4)), the enactment of new regulations requiring modern construction was bad zoning policy for the County. R.2112(12). The County appropriately exercised its legislative authority in approving better storage technology.

Appellants' real mission seems to be to close coal-fired power plants themselves, but energy policy is a matter of state and federal law and regulation, not local zoning. Nonetheless, Appellants used the local zoning hearings as protest forum, attacking coal ash and coal-burning technology by all utilities throughout the country. *See* R.2320(13) ("Breaking Away From Coal"); R.2394(13); R.2418(13); R.3166(17-18); R.3749(20-21); R.4415(24).

2. The Ordinance includes numerous protective restrictions, most fundamentally environmental protections above those required by MDNR and avoidance of truck traffic hauling ash in and out of the County

Coal ash stored in a UWL designed in compliance with the Ordinance would pose no risk to public health. Dr. Lisa J.N. Bradley, a toxicology expert (R.1125-40(6); R.2054-58(12); R.2091-2105(12); R.259-291(2)), gave detailed testimony responsive to concerns about coal ash. She explained that a UWL of the type required by the Ordinance would not create a risk to public health or drinking water resources.

R.1131(6) *et seq*. Her testimony alone makes the issue at least "fairly debatable" and is substantial evidence supporting the Ordinance.

Appellants have provided no support for any claim of deficiencies with the required design, or any viable alternatives, apart from the unsupported assertion that all landfills leak. R.1230(7). An EPA risk assessment indicated otherwise. R.2055(12). If Appellants' sentiment required banning of all landfills, there would be no place for Missourians to store any waste, not just utility waste. There are 34 Missouri landfills (including one in Franklin County), and 8 Utility Waste Landfills (including one under construction by Ameren in St. Charles County). R.2113(12); R.2216(12).

Further, the Commission was shown that MDNR specifically and comprehensively addresses all of the issues raised by Appellants. R.2188(12); R.2193-2214(12); R.2153(12) *et seq*. The Ordinance enacted by the County is an additional layer of regulation, providing more protection to the public. Appellants argue against the Ordinance on the basis that the Plant is in the floodplain and floodway of the Missouri River (where it has been since 1970). As noted above, MDNR regulations specifically provide for installation of UWLs in a floodplain. 10 C.S.R. 80-11.010(4)(B)(1). The County was not required to agree with Appellants' belief that MDNR regulations permitting UWLs in floodplains are bad or inadequate policy.

As noted, in order to investigate the concerns about coal ash, the Commission sent a coal ash sample for laboratory testing, which concluded it was not hazardous. R.601(4); R.1261(7); R.2058(12). This testing was consistent with the expert testimony and other evidence supporting the Ordinance. R.2054-58(12); R.2090-2105(12); R.261-

291(12). Significant amounts of coal ash are actually recycled for beneficial uses including by and within the County itself. R.2991(16); R.2056(12); R.2295(13); R.3675-76(20). Appellants did not refute this evidence in the certiorari record or through a referee at the Circuit Court.

The Ordinance includes multiple, redundant protections, in addition to the comprehensive regulation and review by MDNR, EPA, and the Army Corps of Engineers as to solid waste disposal and wetlands, R.213(2); R.245(2); R.619(4); R.1143-53(6). UWLs must be built to the level of both state sanitary landfill protections and regulations proposed in 2010, but not yet adopted, by the EPA. R.2405(13); R.3194(18).

For example, the top of the berm surrounding the UWL must be above the five hundred (500) year flood level. *See* Ordinance, § 238(C)(3)(d)(i) (Appendix, A13) R.140(1). All berms must be constructed of concrete or cement-based materials. Ordinance, § 238(C)(3)(d)(ii) (Appendix, A13) R.140(1). Waste materials must be compacted and stabilized to withstand flood events. Ordinance, § 238(C)(3)(d)(iii) (Appendix, A13) R.140(1). A 300-foot setback is required from all property lines not under common ownership with the Site, containing a buffer of natural vegetation not less than 25-feet wide. Ordinance, § 238(C)(3)(h) (Appendix, A14) R.141(1). The Ordinance requires a composite liner at least two feet deep, a clay or composite soil component at the base of the UWL at least two feet above the natural water table, and a second inner membrane liner. Ordinance, § 238(C)(3)(c) (Appendix, A12-A13) R.139-40(1).

Most obviously, as argued more fully in subsection 4 below, the Ordinance avoids the export of ash out of the County. In addition, however, the Ordinance prohibits the

transportation of coal ash into the UWL from facilities outside the County, whether owned by the same utility or not. Ordinance § 238(C)(7)(a)(iii) (Appendix, A16) R.143(1). Thus, it will avoid additional truck, rail, or barge traffic, which would be necessary if an off-site solution were selected.

Appellants seize on, but misconstrue, the word "promote" with respect to the public welfare requirement in the County's Zoning Regulations. Appellants would apply a legal requirement that defines "promote" in the sense of active government land use or involvement, such as paying for a public park. "Promotion" of the public welfare, is a concept and term taken from the enabling statute, § 64.815. "Promote," in the context of public welfare zoning enactments, means to support, or not to detract from. Any other meaning would preclude development by any entity other than the County itself. Appellants cite no cases supporting their proposed meaning. The land use permitted by the Ordinance is indeed a public one, as it relates to a heavily regulated public utility providing service to the public. The Ordinance heavily regulates and restricts the UWL land use, thereby further "promoting" the public welfare.

3. The Site is the best location for a UWL.

It would be impossible for the County's elected officials to select a more appropriate location for storage of a public utility's coal ash than the Site. The Ordinance provides that coal ash may not be stored in a UWL unless it is adjacent to a power plant already in operation. R.2091(12); R.2377(13).

The Ordinance is supported by the testimony and report of Richard C. Ward, the zoning and land use expert, who explained the common sense basis for a zoning

ordinance allowing a UWL next to the Plant. R.615-17(4). The Plant and Site are isolated from development by farmland that is almost wholly uninhabited. R.2114-18(12). Any land use issues, while not genuinely raised by Ordinance opponents, were refuted by a simple aerial photographic tour of the Site and the County's current land use and zoning maps. *Id*.; R.1475(8). Appellants do not claim anyone would be able to see a utility coal ash facility next to the plant. Anyone who could see a UWL at the Site would also be able to see the Plant itself, including the existing coal pile, transmission lines, rail lines, fuel storage tanks, and coal ash disposal ponds that have been in place since 1970. R.2067(12). Appellants put forward no evidence regarding whether they bought their homes before or after 1970.

4. There was no competent evidence of legitimate zoning issues.

Land use issues that are relevant in assessing legislative zoning decisions are aesthetics and view, traffic, noise, light and air pollution, effect on property values and consistency with a comprehensive plan. *See, e.g.*, *Huttig* and *Hoffman, supra*; Salkin, *American Law of Zoning,* §§7:4-7:34 (5th ed. 2008). The Court may note that the record and Appellants' Brief advance no evidence of impact on aesthetics, traffic, noise, air quality, and effect on property values.

Most fundamentally, the UWL avoids hauling ash out of the County, over County roads and through residential areas. In addition, importation of ash from plants outside the County is prohibited. Ordinance, § 238(C)(2) (Appendix, A11-12) R.138-39(1).

Secondly, there was *no claim whatsoever that Appellants will even see a utility coal ash facility next to the plant. See* Appellants' Petition. Photographs showing

renderings of a typical utility waste landfill from various perspectives above the valley, with the plant in the background, proved that view of the UWL was not an issue. R.2123-30(12). Appellants could not make such a traditional zoning argument, presumably because they would have to argue that they or their predecessors have been looking at the Plant itself, including the existing coal pile, transmission lines, rail lines, fuel storage tanks, *and coal ash disposal ponds,* since 1970. R.2067(12).

The Commission took evidence that the process of dry storage of coal ash involves a wet slurry transportation of the ash from the adjacent plant, which hardens within a matter of days, and is sprayed while stored to hold dust down. R.229(2); R.2107-08(12). The only evidence regarding air pollution was the testimony of one witness who talked about dust being emitted during the placement of coal ash in the landfill. R.1181(7). The area of the landfill is isolated and distant from the nearest home.

The Commission considered the County's Master Plan and its Existing Land Use Map, which the County itself prepares. R.2121(12). Appellants make references to general statements in the Master Plan about avoiding "development in the floodplain," but neither the County's Zoning Regulations nor the Master Plan prohibit development in a floodplain, and in fact the Zoning Regulations include an entire appendix regulating the method of development in floodplains. R.1985(11). The Master Plan, as noted, specifically recommends industrial development for the flood plain area of the proposed UWL next to the existing Plant. R.1599(9).

The Record does not include any competent evidence that property values of anyone near the plant would be impacted. Purported evidence of potential impact of

garbage dumps on property values was not relevant, as it obviously implicated drastically different public health concerns than state-of-the-art UWLs. Appellants cite an e-mail sent to the Commission by broker Roberta V. Rollins, who incorrectly believed that the Ordinance would allow landfills in *any* zoning district. R.29(7). In fact, the Ordinance prohibits UWLs in residential zoning districts. *See* Ordinance § 238(c)(1). The Commission further mitigated any such concerns by requiring landscaping, setbacks, and buffering.

5. UWLs should have been allowed by the County even without the Ordinance.

In addition to the jurisdictional mootness set out in Respondent's Motion to Dismiss, the Ordinance was not even be required for construction of the Ameren UWL because UWLs are accessory (and therefore permitted as of right) uses under the County's existing zoning ordinance. Section 227 of the County's Zoning Regulations specifically permits an activity conducted in conjunction with the principal use that "(i) constitutes only an incidental or insubstantial part of the total activity that takes place on a lot, or (ii) is commonly associated with the principal use and integrally related to it." This provision does not even require that the accessory use be located on the same lot as the principal use. The Zoning Regulations go on to provide examples of common accessory uses, for example, home offices, hobbies, or recreational activities within a residence. In *City of Richmond Heights v. Richmond Heights Presbyterian Church*, 764 S.W.2d 647 (Mo. banc 1989), this Court held that a daycare facility was subordinate and therefore an accessory use to a permitted church use.

In the present case, storage of coal ash is a clearly a subordinate, if necessary, part of operation of the adjacent power plant. The Ordinance, by its very definition of "Utility Waste Landfill," includes storage of ash as a part of a power plant where there is combustion of coal. Ordinance, §268(A)(22).

In *State ex rel. Fred Weber, Inc. v. St. Louis Cnty.*, 205 S.W.3d 296 (Mo. App. 2006), the Court of Appeals held that stockpiling of recyclable asphalt was not an accessory use for a permitted use of quarrying rock and stone, but relied upon uncontested testimony that the quarry could be operated without stockpiling recycled asphalt and that stockpiling was not essential to the processing of quarried rock, in contrast to the present case. Conversely, in *Barr v. City Council of City of Chesterfield*, 904 S.W.2d 27 (Mo. App. 1995), the Court of Appeals held that a medical office building was in fact an accessory use to a permitted hospital use, where there was testimony that the medical office building helps the hospital attract patients and specialists, and helped the hospital compete with other hospitals, furthering the quality of patient care.

In *Village of Westwood v. Bd. of Adjustment of Municipality of Creve Coeur*, 811 S.W.2d 437 (Mo. App. 1991), the Court of Appeals held that a solid and infectious waste incinerator was an accessory use to a hospital, in that the incinerator was on the hospital site, would be operated for the benefit of the hospital, and would provide some heat for the entire facility.

The original PSC certificate in 1966 expressly contemplates the use of coal and necessarily the storage of ash for the Plant. R.2067(12) *et seq*.

CONCLUSION

Faced with an important project with regional ramifications, the Commission undertook extensive diligence, and invited and managed public participation beyond all legal requirements. Both the legislative policy decision they made and the process by which they made it were fair, reasonable, and expansive, and made eminent sense for many reasons. Judicial review of the legislative process and result should not seek to re-weigh the evidence, but should be limited to protecting the prerogative of the legislature to conduct the hearings within general bounds of fairness and to make legislative decisions which are fairly debatable. In this case, the Commission's decision was justified by the extensive evidence and testimony it considered, and should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 13,690, exclusive of the cover, signature block, appendix, and certificates of service and compliance.

The undersigned further certifies that the electronic copies of this brief filed with the Court and served on the other parties were scanned for viruses and found virus-free through the Norton anti-virus program.

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